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SEP 9
HAROLD B. WI

No. 328

IN THE

Supreme Court of the United States

October Term, 1953

COMMONWEALTH OF PENNSYLVANIA
Petitioner

v.

MELLON NATIONAL BANK AND TRUST COMPANY, Successor to Mellon National Bank

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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Commonwealth of Pennsylvania,
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v.

Mellon National Bank and Trust Company,
Successor to Mellon National Bank

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF

The Commonwealth of Pennsylvania, the petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above cause.

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 374 Pa. 519.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on June 26, 1953. The jurisdiction of the Court is invoked under 28 U.S.C.A., Sec. 1257(3).

QUESTIONS PRESENTED

Note:—The Pennsylvania Act of July 15, 1897, P. L. 292, imposed a tax of 4 mills upon shares of state and national banks. The Pennsylvania Act of July 13, 1907, P. L. 640, imposed a tax of 5 mills upon shares of trust companies, but under a ruling of this court Federal securities were required to be deducted in valuing the shares of trust companies.

1. Was the tax imposed by the Act of 1897 upon shares of the class of national banks at a greater rate than the tax imposed by the Act of 1907 upon shares of the class of trust companies, and in violation of Section 5219 of the Revised Statutes of the United States?

2. Do the differences between the rates of tax assessed against shares of national banks and the rates assessed against shares of trust companies amount to a substantial discrimination within Section 5219.

3. Do the rates of tax assessed against the shares of the 7 largest, out of a total of 715, national banks, if substantially higher than the rates assessed against the 7 largest, out of a total of 236, trust companies, show a violation of Section 5219?

4. Did a comparison of the rate of tax paid by the largest trust company with the rate paid by the largest national bank afford a proper test of discrimination under Section 5219?

Questions Presented

5. Do differences between the actual or effective rates paid on shares of national banks and those paid on shares of trust companies, where such differences result principally from unusually large investments by each class of banks in Federal securities during the depression, show in 1934 a substantial discrimination in violation of Section 5219?

6. Did these unusually large purchases of Federal securities by national banks constitute such **a change of circumstances** as would render the assessments under the Act of 1897 and the method of assessment thereunder, which were not discriminatory in 1928, a violation in 1934 of Section 5219?

7. Does the rule that a change of circumstances may render a statute unconstitutional apply in this case where the only change was brought about by the voluntary act or choice of the respondent itself in purchasing Federal securities?

8. After ruling that in order to equalize the tax on shares of national banks with that on shares of trust companies securities of the Federal government should be deducted (as required by the decision of the Supreme Court of the United States in the case of shares of trust companies), did the court below err in calculating the tax of the respondent at 4 mills, the rate applicable to national banks, instead of the rate of 5 mills applicable to trust companies, thereby giving a lower effective rate to national banks?

STATUTES INVOLVED

The relevant provisions of the statutes are printed in the Appendix, page 36.

STATEMENT

For the calendar year 1934, the Mellon National Bank, for its shareholders, paid a tax on its shares amounting to $145,783.65.

This assessment was made under the Act of June 15, 1897, P. L. 292, as last amended by the Act of May 31, 1933, P. L. 1130, which provides that every bank organized under the laws of Pennsylvania or of the United States shall collect a tax at the rate of **4 mills** on the actual value of each share from its shareholders, and pay the same to the State Treasury.

This tax by Pennsylvania upon shares of national banks was authorized by Section 5219 of the Revised Statutes of the United States, which provides, however, that the tax shall not be at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens of the State (12 U.S.C.A., Sec. 548).

When the Act of 1897 was passed, trust companies in Pennsylvania were not classed as banks.

Statement

In 1934 the Act of July 13, 1907, P. L. 640, as amended by the Act of May 31, 1933, P. L. 1132, imposed a tax of **5 mills** upon actual value of shares of trust companies.

The Acts of 1897 and 1907 each provided that the actual value of each share should be determined by adding together the capital paid in, surplus and undivided profits and dividing the total by the number of shares.

The Act of 1907, however, provided that from the total of capital stock, surplus and undivided profits there should be deducted amounts invested in corporations which had paid or were relieved from paying a Pennsylvania tax.

No corresponding exemptions were provided by the Act of 1897 for national banks. Respondent did not claim that these exemptions more than equalized the difference between the rates of 4 and 5 mills.

In the opinion of the Supreme Court of Pennsylvania, it was said:

> "* * * The defendant concedes that so long as the deductions allowed trust companies were limited to the value of the stock they owned in Pennsylvania corporations, any seemingly inequality of treatment in respect of a National bank was adequately counteracted by the differential in millage favorable to a bank (State or National) and adverse to a trust company * * *" (R.).

For the calendar year 1934, the following banking corporations filed returns for the purpose of tax on shares.

715 National banks, taxed under the Act of 1897 (Stip. R. 48a).

176 State banks, taxed under the same Act of 1897 (Stip. R. 46a, note).

236 trust companies, taxed under the Act of 1907 (Stip. R. 46a).

In paragraph 17 of the Stipulation the trust companies are referred to as "State institutions". However, as the note to this paragraph states, there are 176 State banks which do not do any trust business (Stip. R. 46a). These 176 State banks are also State institutions but are not included in the term "State institutions" as used in the Stipulation.

In 1935, in **Schuylkill Trust Co. v. Pennsylvania**, 296 U. S. 113, a majority of the Supreme Court of the United States (Justices Cardozo, Brandeis and Stone dissenting) held that an assessment of tax upon the shares of the trust company under the Act of 1907 was in violation of the Federal Constitution, because the Act of 1907 expressly provided for the exemption of shares owned by trust companies in corporations which had paid or were relieved from paying a Pennsylvania tax, but did not provide for the exemption of Federal securities. The Supreme Court of Pennsylvania had held that the assessment was valid. As a result of this decision of the Supreme Court of the United States, the assessment against the Schuylkill Trust Company was revised by deducting the value of the Federal securities in **Commonwealth v.**

Schuylkill Trust Company, 327 Pa. 127 (1937), and its decision was affirmed in **Schuylkill Trust Company v. Pennsylvania**, 302 U. S. 506 (1938).

By agreement of merger, effective on June 23, 1946, the Union Trust Company of Pittsburgh was merged into Mellon National Bank, under the name of Mellon National Bank and Trust Company, which name has been substituted as the defendant in this case (Stip. par. 1 R. 40a).

Mellon National Bank and Trust Company, defendant, contends that the assessment of $147,786.65 imposed upon its shares is at a greater rate than is assessed upon other moneyed capital, and more specifically, than is imposed upon shares of Pennsylvania trust companies.

It was agreed by counsel for the respondent and for the Commonwealth that a satisfactory comparison could be made only by considering every national bank and every trust company. A tabulation of all such returns was made by the Department of Revenue and from this tabulation other tabulations were made by the Commonwealth and by the defendant, and these tabulations were offered in evidence and the results were embodied in a stipulation (R. 27a) and supplemental stipulation (R. 84a).

In 1934, the shareholders of 186 trust companies (all trust companies the total of whose capital, surplus and undivided profits was less than $1,000,000) out of a total of 236 trust companies were paying an average rate of tax of .00352. If taxed at the national bank rate under the Act of 1897, their average rate of tax would amount to .00349,

or .00003 less than under the trust company rate (Plff's 2nd request, 116a, affirmed 156a, 161a).

Also shareholders of 229 trust companies out of the total of 236, actually paid an average rate of .00317. If taxed on the national bank basis under the Act of 1897, their average rate would be .00356, or only .00039 greater than under the trust company rate (Plff's 4th request, 116a affirmed 156a, 161a). This calculation included all trust companies except the seven largest ones.

All trust companies paid an average rate of .00196 and if taxed on the national bank basis would have paid an average of .0035, or a difference of .00154.

All national banks paid an average rate of .00385 and if taxed on a trust company basis would have paid an average of .00202 or a difference of .00183.

For the year 1928 the average rate paid by all trust companies was .00374 and on the national bank basis would have been .00398 or only .00024 more (Pltff's 6th request, 117a, affirmed 156a).

For the same year the average rate paid by all national banks was .00398, and on the trust company basis would have been .00357, or a difference of .00041.

Between the years 1928 and 1934 the Mellon National Bank increased its investment in Federal securities from $51,713,428 to $162,065,398 or 347.31% (Stip. par. 32 (h) 63a, Plff's 7th req. 117a, affirmed 156a). The effect of this increased holding of Federal securities was to raise the

rate of tax paid by the Mellon National Bank in comparison with that paid by trust companies.

In 1934, Mellon National Bank owned 17% of the total Federal securities held by all of the 715 national banks in Pennsylvania. Union Trust Company owned 43% of the total Federal securities held by all of the 236 trust companies in Pennsylvania (Plff's 8th req., 117a, affirmed 156a, 162a).

The holdings of Federal securities by all national banks of the United States decreased from $39,419,227,000 on June 30, 1947, to $35,595,411,000 on June 30, 1949 (Plff's 10th req., 117a, affirmed 156a, 162a).

For the current year ending December 31, 1934, the Pennsylvania Department of Revenue assessed the tax in the sum of $145,783.65, and this tax was paid and an appeal was taken to the Court of Common Pleas of Dauphin County, and was tried without a jury. The Court of Common Pleas reduced this assessment to $15,796.40, and this reduced assessment was affirmed by the Supreme Court of Pennsylvania.

REASONS FOR ALLOWANCE OF WRIT

1. In holding that discrimination and conflict with R. S. 5219 may be shown by the effect of a rate upon one individual national bank, or several national banks, instead of by the effect upon the class of 715 national banks, the State Court has decided a Federal question of substance in a way not in accord with applicable decisions of this court.

The opinion of the court below states:

> "• • • 'the Mellon National Bank for the year 1934 was taxed at a greater rate than was assessed upon other moneyed capital in the State coming into competition with it.' Consequently, the assessment violated the restriction in Section 5219 of the Revised Statutes." (R.).

In **Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Commission**, 309 U. S. 560 (1940), this Court said:

> "A consideration of the course of judicial decision on *R. S. 5219* and its predecessors can leave no doubt that the various restrictions it placed on the permitted methods of taxation are designed to prohibit only those systems of state taxation *which discriminate in practical operation against national bank-*

ing associations or their shareholders **as a class.** * * * 567)

"* * * Discrimination is not shown merely because a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations. * * *" (568) (Emphasis supplied)

In **Amoskeag Savings Bank v. Purdy,** 231 U. S. 373 (1913), the Court said:

"Nor can we say that the taxing scheme contravenes the limits prescribed by Section 5219, Rev. Stat., merely **because in individual cases it may result that an owner of shares of national bank stock, who is indebted, may sustain a heavier tax than another, likewise indebted, who has invested his money otherwise.** * * * **It does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual.**" (393-394) (Emphasis supplied).

Again in **Colgate v. Harvey,** 296 U. S. 404, 80 L. Ed. 299 (1935), this Court said:

"* * * 'And **inequalities** that result not from hostile discrimination, but occasionally and **incidentally** in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law.' * * *" (Emphasis supplied)

2. Adherence to the reasoning of the court below would wholly destroy the principle of classification and make the exercise of the sovereign power of taxation dependent upon the facts of each particular case.

Once a class of national banks is broken, it would be necessary to calculate and compare the tax paid by every national bank with the tax which it would pay on the trust company basis, or vice versa, and then determine whether any difference found amounted to a substantial discrimination.

A year or two later a similar calculation, due to changes in holding of Federal securities, might produce a different and perhaps an opposite result.

It is not the law, we submit, that the Legislature of Pennsylvania must synchronize its tax laws or assessments with the ebb and flow of Federal securities in and out of national banks. If the holdings of a national bank in Federal securities should amount to less or be reduced to less than 20% of their capital, surplus and undivided profits, then the national bank would be paying a lower actual rate of tax than the trust companies do. (Infra, p. 21).

By its own act in purchasing Federal securities, Mellon cannot invest itself out of the class of national banks or create a basis for a special tax rate for itself alone, as compared with trust companies and other national banks.

3. This Court has frequently decided the question whether a discrimination is substantial within R. S. 5219, but has never indicated that the small differences between rates of tax, such as those in this case, amount to **substantial** discrimination. The greatest differences claimed by the respondent were .00154 if trust companies were taxed on the national bank basis, and .00183 if national banks were taxed on the trust company basis. The smallest difference held by this Court to be substantial discrimination was 8 mills. In other cases, in which this Court found substantial discrimination, the differences were much greater. (Infra, p. 27).

Respondent's contention that the available rate assessed on shares of national banks is twice that assessed on shares of trust companies, still does not show a substantial discrimination. A rate of ½ mill would be twice the rate of ¼ mill but neither rate would amount to a substantial discrimination.

What is a substantial discrimination must be determined by the purpose of R. S. 5219. From many expressions of the Supreme Court, it is clear that the intention of Congress was to protect national banks from discriminatory taxes which might hinder the growth of such banks and aid the growth of state banks.

Appellee has wholly failed to prove that a difference of a fraction of a mill or even of one or two mills would have the effect of promoting the growth of state banks at the expense of national banks.

Amoskeag Savings Bank v. Purdy, 231 U.S. 373, 389-390 (1913).

Courts cannot assume or take judicial notice that the differences shown in the case at bar would deter an investor from purchasing shares of national banks or prevent the growth of such national banks. The burden was on the respondent to prove this and no effort was made to sustain that burden.

The phenominal growth of national banks since 1897 and 1907—and the Mellon National Bank is an outstanding example—demonstrates that national banks have been more than able to compete with state banks and that their growth has not been hampered by any Pennsylvania tax discriminating in favor of trust companies.

4. The opinion of the court below states:

> "* * * **It must not be overlooked that changed circumstances may cause a tax assessment under an admittedly valid statute to be unconstitutionally discriminatory.** * * *" (Emphasis supplied)

The purchase of Federal securities, resulting in an increase in the holdings of the same, is not a change of **circumstances** at all. It is a voluntary act by the national bank, the taxpayer itself, made with knowledge that the Act of 1897 provides no exemption of Federal securities.

> "* * * The fact that in a given instance, by reason of an exercise of a discretion as to the particular kind of securities purchased, a trust company may have a real or imaginary advantage over investors in the

shares of a national bank is not a sufficient foundation for declaring an assessment invalid. * * *" (**Jenkins v. Neff**, 186 U.S. 230, 237 (1902)).

The decisions of this Court, holding that a change of circumstances may invalidate a statute, have been concerned with the exercise of the **police power.** We have found no decision of this Court which held that a change of circumstances invalidated a tax law of a state.

If the purchase of Federal securities were such a change of circumstances as would render a tax law or assessment discriminatory and unconstitutional, such a decision might completely unsettle a financial budget adopted by the Legislature.

5. The case at bar is a test case which will decide many other appeals filed in the Court of Common Pleas.

CONCLUSION

It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION

I. Section 5219 gives a state the right to tax the full value of the shares of national banks, although the national bank owns federal securities.

The national bank cannot defeat the right of the state by choosing to invest in federal securities.

Numerous decisions of this court have so held:

Van Allen v. Assessors, 70 U. S. (3 Wall.) 573, 582 (1865);

People v. The Commissioners, 71 U. S. (4 Wall.) 244, 258 (1866);

Tradesmens Bank v. Tax Commission, 309 U. S. 560, 564-565 (1940);

Peoples National Bank v. Board of Equalization, 260 U. S. 702.

In **Des Moines Bank v. Fairweather,** 263 U. S. 103 (1923), a State tax upon the shares of a national bank was sustained although in assessing capital employed in private banking investments securities of the United States were held exempt and deducted, but in assessing shares of a national bank its investment in such securities was not deductible.

A state may tax the shares, although the entire capital of the national bank is invested in federal securities. Van Allen v. Assessors, 70 U. S. (3 Wall.) 573, 582 (1865), supra.

In **Schuylkill Trust Co. v. Pennsylvania,** 302 U. S. 506 (1938), Mr. Justice Roberts said:

> "* * * The State need not have made any exemption or concession in taxing the property in the shares on account of value therein reflected from the company's ownership of obligations of the government or its instrumentalities other than national bank stock. * * *" (513, 514)

In his dissenting opinion, **Schuylkill Trust Co. v. Pennsylvania,** 296 U. S. 113 (1935) Mr. Justice Cardozo said:

> "* * * The tax being laid upon the shares, and not upon the capital, the Constitution does not make it necessary in the assessment of the tax to reduce the value of the shares to the extent that bonds of the national government are included in the capital. This is settled law. Van Allen v. Assessors, 3 Wall. 573 * * *" (124)

Our position is that the 4% rate on shares of national banks substantially equalizes the combination of the 5% rate on shares of trust companies with the right to deduct federal securities owned by the trust company; and that there is no substantial discrimination against the shares of national banks.

II. This court has repeatedly declared that the purpose of Section 5219 is to prevent hostile and unfriendly discrimination against national banks.

This interpretation was made in:

Mercantile Bank v. New York, 121 U. S. 138 (1887);

First National Bank of Garnett v. Ayers, 160 U. S. 660, 666-667 (1896);

Aberdeen Bank v. Chehalis County, 166 U. S. 440, 457 (1897);

National Bank of Wellington v. Chapman, 173 U. S. 205, 213-214 (1899);

Jenkins v. Neff, 186 U. S. 230, 231 (1902);

Clement National Bank v. Vermont, 231 U. S. 120 (1913);

Des Moines Bank v. Fairweather, 263 U. S. 103 (1923).

That the Act of 1897 does not amount to hostile or unfriendly discrimination clearly appears from the fact that the Act of 1897 applied equally to state and national banks. This point was relied upon in **Jenkins v. Neff,** 186 U. S. 230, 232 (1902) and **Amoskeag Savings Bank v. Purdy,** 231 U. S. 373, 391-392 (1913). In addition, the State did not permit a trust company to deduct holdings of federal securities until it was required to do so by the decision of this court in Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 193 (1935), supra.

As Mr. Justice Roberts said in **Schuylkill Trust Co. v. Pennsylvania,** 302 U.S. 506 (1938):

> "It is apparent that the legislature intended to tax trust companies on the same basis as banks". (513)

In **First National Bank of Hartford, Wisconsin v. City of Hartford,** 273 U. S. 548 (1927), Mr. Justice Stone, speaking of Section 5219 said: "state legislation and taxing measures which by their necessary operation and effect discriminate against capital invested in national bank shares in the manner described are intended to be forbidden." (560-561)

III. The evidence does not show that the necessary effect of the Acts of 1897 and 1907 is to impose a substantially greater rate of tax upon shares of national banks as a class than is assessed upon trust companies as a class.

The stipulation (par. 28 (d), R. 54a) states that any difference:

> "* * * is due principally to the deductions for investments in shares of Federal Reserve Banks, in shares of corporations paying or relieved from the payment of tax to Pennsylvania and in securities of the United States * * *"

However, a national bank must invest more than 20% of its capital, surplus and undivided profits in federal se-

curities in order to show even the slightest excess in the actual rate of tax paid on its shares over and above the actual rate paid on shares of a trust company. This is shown by a comparison of a national bank and a trust company, each owning $200,000 in federal securities, and each having a total capital, surplus and undivided profits of $1,000,000:

	National bank		*Trust company*
Capital surplus,	$1,000,000		$1,000,000
Undivided profits			
Federal securities	200,000	(not deductible)	200,000
	1,000,000		800,000
	.004		.005
	4,000		4,000

If the trust company sells $100,000 of federal securities, the tax will be 5 mills on $90,000 or $4,500, which is $500 more than the tax will be for the shares of the national bank.

If the national bank has less than 20% invested in federals, it will pay a lower actual percentage under the Act of 1897 than the trust company pays under the Act of 1907.

1928

The fairest comparison may be obtained by considering figures for the year 1928, before the changes caused

by the financial depression and the increase in holdings of federal securities by banks.

The Act of 1907 had then been in force for 21 years.

All Trust Companies

	Trust Company Basis	National Bank Basis	Difference	Paragraph of Stipulation
1928	.00374	.00398	.00024	29 (c) R. 55a
		All National Banks		
1928	.00357	.00398	.00041	32 (c) R. 61a

These figures for 1928 show that the average rates of tax paid are substantially the same whether the trust companies are calculated on the national bank basis or national banks are calculated on the trust company basis.

As late as 1928, the Act of 1907 had had no effect in producing discrimination between shares of national banks as a class and shares of trust companies as a class.

The figures for 1928 are chosen as more representative because between 1928 and 1934 the large national banks and trust companies, and particularly the Mellon National Bank and Union Trust Company of Pittsburgh, very greatly increased the proportion of their capital, surplus and undivided profits which was invested in federal securities.

During the depression banks bought federal securities because they were less liable to depreciate in a declining market.

In 1928 the Mellon National Bank had invested in United States securities the sum of $51,713,428. In 1934

the corresponding figure was $162,054,398. This amounts to an increase of 347.31% (Stip. par. 32 (h) R. 62a).

In addition, the proportion of total assets which the Union Trust Company had invested in government securities increased from 29% in 1928 to 49% in 1934.

In 1934 Mellon National Bank owned 17% of the Federal securities held by 715 national banks in Pennsylvania. Union Trust Company owned 43% of the federal securities held by 236 trust companies in Pennsylvania.

In Exhibit "X", a letter by a Deputy Controller of the Currency of the United States, states that on June 30, 1928, national banks in the United States owned federal securities in the total amount of $2,891,167,000. On June 30, 1934, the corresponding total was $6,003,652,000.

The Annual Reports of the Secretary of the Treasury on the State of the Finances for the fiscal years ending June 30, 1947, 1948 and 1949 show that liquidation of holdings of national banks did occur, as their total holdings of federal securities on those dates were:

	Number of National Banks	United States Government Securities—Direct Obligation
June 30, 1947	5018	$39,419,227,000
June 30, 1948	5004	36,226,156,000
June 30, 1949	4993	35,595,411,000

The fact that federal securities are deducted as exempt in calculating the tax on trust companies under the Act of 1907 and are not deducted as exempt in calculat-

ing the tax on national banks under the Act of 1897, does not show a violation of Section 5219.

As Mr. Justice Roberts said in **Schuylkill Trust Co. v. Pennsylvania,** 302 U. S. 506 (1938):

> "• • • And the principle of equal protection does not demand that because one company owns wholly exempt securities, with consequent exemption of its shareholders from the exaction, the state shall abstain from taxing the shareholders of another company whose investments carry no such exemption." (514) (Citing Van Allen v. Assessors, 70 U. S. (3 Wall.) (573)

In the supplemental stipulation (par. 2, 3, R. 78a-81a) are included calculations of the average rate of tax which would have been paid in 1934, if the fifty or the ten largest trust companies were taxed on the national bank basis; and also the average rate of tax which would have been paid if the forty-seven largest national banks were taxed upon the trust company basis.

These figures, however, we submit, are not representative. The comparatively few largest banks chosen are so large and owned such extraordinary amounts of Federal securities that they tip the balance so as to show higher actual rates paid by national banks.

In Exhibit "L", defendant has picked out 4 trust companies (one of them being the Union Trust Company) which are most favorable to its contention, and has omitted

the numerous other trust companies in the Pittsburgh district.

In 1934, Mellon had the largest capital of any national bank in Pennsylvania. Union was the largest trust company.

IV. Any inequality is limited to a few exceptional cases of very large national banks and trust companies.

R. S. 5219 prohibits only taxes which discriminate against national banks or their shareholders **as a class.**

Discrimination is not shown by the fact that a few trust companies out of a larger class are taxed at a lower rate than those imposed upon national banks.

The following authorities have already been cited, supra:

Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Commission, 309 U. S. 560 (1940);

Amoskeag Savings Bank v. Purdy, 231 U. S. 373 (1913);

Maxwell v. Bugbee, 250 U. S. 525 (1919).

V. Appellee has failed to prove that substantial discrimination exists against the class of national banks.

In 1934, the shareholders of 186 trust companies out of a total of 236 trust companies were paying an average rate tax of .00352. If taxed at the national bank rate under the Act of 1897, their average rate of tax would amount to .00349, or .00003 less than under the trust company rate (Plff's 2nd request, 116a, affirmed 156a, 161a.)

Also shareholders of 229 trust companies out of the total of 236, actually paid an average rate of .00317. If taxed on the national bank basis under the Act of 1897, their average rate would be .00356, or only .00039 greater than under the trust company rate (Plff's 4th request, 116a affirmed 156a, 161a). This calculation included all trust companies except the seven largest ones.

All trust companies paid an average rate of .00196 and if taxed on the national bank basis would have paid an average rate of .0035, or a difference of .00154.

All national banks paid an average rate of .00385 and if taxed on a trust company basis would have paid an average rate of .00202 or a difference of .00183.

Appellee has failed to prove that substantial discrimination exists against the class of national banks.

Under the familiar rule the burden is upon the party attacking the constitutionality of a statute to prove every fact necessary to show such unconstitutionality.

No federal decision has held differences similar to those in this case to be a substantial discrimination.

In the following cases the differences were held to be substantial:

First National Bank v. Anderson, 269 U. S. 341 (1926) 143.5 mills for shares of national banks; 5 mills on other moneyed capital;

Minnesota v. First National Bank, 273 U. S. (1927) 67 mills of 40% valuation for national bank shares; 3 mills of full valuation for other moneyed capital;

Merchants National Bank v. Richmond, 256 U. S. 635 (1921) .0175 on shares of national banks and .0095 on other moneyed capital; or a difference of 8 mills.

Eddy v. First National Bank, 275 Fed. 550 (1921) (appeal dismissed by stipulation in 260 U. S. 752) 35 mills on national banks and 3.5 mills on other moneyed capital;

Toy National Bank v. Nelson, 38 F. 2d 261 (1930) 150 mills for national banks and 5 to 6 mills for other moneyed capital.

In the majority of cases the alleged discrimination was in the failure to tax at all, certain classes of moneyed capital.

The issue in this case involves the right of the sovereign, Commonwealth of Pennsylvania, to levy a tax. It should not be resolved on the basis of slight differences in rates of taxation upon shares of state and national banks

or on rates or on differences which vary with years and conditions. What would be substantial discrimination between private parties might not be such between sovereign governments.

The provision of R. S. 5219 has been part of the federal law since the National Bank Act of June 3, 1864.

Appellee has wholly failed to prove that a difference of a fraction of a mill or even of one or two mills would have the effect of promoting the growth of state banks at the expense of national banks.

In order to come within the provision of Section 5219, the discrimination must be substantial.

Boyer v. Boyer, 113 U. S. 689, 695, 701 (1885);

Mercantile Bank v. New York, 121 U. S. 138, 162 (1887);

Montana National Bank of Billings v. Yellowstone County of Montana, et al., 276 U. S. 499, 503 (1928);

First National Bank of Shreveport, et al. v. Louisiana Tax Commission, et al., 289 U. S. 60, 65 (1933);

Eddy v. First National Bank of Fargo, 275 Fed. 550, 552 (1921).

Even if it were conceded that the seven largest national banks will pay substantially higher rates than trust companies, that would not prove that the Pennsylvania Act of 1907 discriminates substantially against the class of national banks.

VI. The taxes in the Acts of 1897 and 1907 are imposed upon shareholders and not upon the property or assets of the banks.

The act applicable to national banks in 1934 was the Act of June 15, 1897, P. L. 202, as last amended by the Act of May 31, 1933, P. L. 1130, which provided in Section 1 that the Secretary of Revenue should "assess such shares for taxation"; and

> "* * * It shall be the duty of every bank or savings institution, within a period of sixty days after the date of such settlement by the Department of Revenue to collect the amount of said tax from its shareholders and pay the same to the State Treasurer through the Department of Revenue: * * *"

The Act of 1907 likewise imposed the tax upon the shareholders.

In **Schuylkill Trust Company v. Pennsylvania,** 302 U. S. 506 (1938), Mr. Justice Roberts said:

> "* * * We are of opinion that the tax is one upon the shares as such and not upon the assets of the company." (513)

The Act of 1907 was also construed to impose a tax on the shareholders in **Commonwealth v. Union Trust Company of Pittsburgh,** 237 Pa. 353 (1912); and in **Commonwealth v. Schuylkill Trust Company,** 315 Pa. 429 (1934).

Likewise Section 5219 is directed against discrimination, not against capital invested, but against the holders of shares of the banks owning such capital.

These shareholders have equal rights, whether they own shares in one of the seven large national banks or in a smaller national bank. The size of a national bank is no indication of the number of its shareholders. Some of the largest national banks may have a comparatively small number of shareholders.

However, regardless of the size of the national bank or the number of its shareholders, every holder of shares in a national bank has equal right under the Constitution of the United States and under Section 5219 of the Revised Statutes.

VII. The court below erred in calculating the tax upon the shares of appellee at the rate of four mills.

In its second conclusion of law (170a), the court calculated the tax as follows:

$36,445,913	Capital stock paid in, surplus and undivided profits.
$32,496,813	U. S. securities and Federal Reserve Bank shares owned
$ 3,949,100	Taxable value
.004	
$ 15,796.40	Tax due

By deducting the item of Federal securities, the court placed national banks on an equal basis with trust companies. The court then calculated the tax of the Mellon Bank at the four-mill rate provided for national banks. Trust companies, however, were required to pay at the rate of five mills.

The calculation, therefore, places a national bank on a better basis, at a lower effective rate than a trust company.

If the national bank is given the same exemption as the trust company, it should then pay at the same rate as the trust company.

As the court said (160a) in its opinion:

> "The phrase 'greater rate' does not refer merely to the statutory millage but to the effective rate resulting from the whole process of assessment, valuation and like factors."

Unless the adjusted valuation for the shares of national bank is taxed at the rate of five mills applicable to trust companies, a discrimination results in favor of the national bank and against the trust company.

This ruling gave the appellee the benefit of (1) the exemption of Federal securities conferred upon shares of trust companies by the decision of the Supreme Court of the United States in **Schuylkill Trust Company v. Pennsylvania**, 296 U. S. 113; and (2) the lower rate of four mills enjoyed by shareholders of national banks. This

ruling clearly and necessarily gives to the appellee the advantage of the exemptions which a trust company has, and in addition, the advantage of the lower rate of four mills which a trust company does not have.

In its effort to eliminate the alleged discrimination against national banks, the court below creates a new discrimination against trust companies.

The decree gives to the appellee the cake and the penny too.

In the method of calculating the tax, the Schuylkill Valley Trust Company case is distinguishable. The latter case involved taxes only on shares of trust companies, and not a comparison between rates for trust companies and national banks. Therefore, the only rate of tax applicable was one of five mills, both in the original calculation and in the calculation as finally revised by this Court.

In the case at bar the question is whether the advantage of the deduction of federal securities as against the disadvantage of a higher rate of five mills results in a lower rate of tax on the shares of trust companies than on the shares of national banks which are taxed at the lower rate of four mills.

VIII. Conclusion

In **Commonwealth v. Union Trust Company of Pittsburgh,** 345 Pa. 298 (1942), the Union Trust Company claimed and obtained the benefit of the decision of the Supreme Court of the United States in the two Schuylkill Trust Company decisions. And now, the Mellon National Bank and Trust Company, having acquired the assets of the Union Trust Company by consolidation under an Act of Congress seeks to use the exemption previously secured by Union as a basis for a charge of discrimination and as a lever for obtaining the exemption of the federal securities owned by Mellon National in 1934.

The Union Trust Company of Pittsburgh, for 1934, paid an exceptionally low rate of tax per share and appellee uses the low rate of the Union Trust Company to show that the higher rate imposed on the Mellon National Bank was discriminatory. However, the Mellon National Bank has since acquired the assets and business of the Union Trust Company of Pittsburgh and has thereby obtained the benefit of the unusually low rate of tax as to assets owned by the Union Trust Company. If the decision of the court below is allowed to stand, the Mellon National Bank and Trust Company will win both ways. It will secure a reduction of rate based upon comparison with the low rate for Union Trust Company, in spite of the fact that Mellon National Bank now owns all the assets

of the Union Trust Company, and which has received the benefit of the lower rate imposed upon shares of Union Trust Company for 1934.

In conclusion, we submit that in spite of the difference in rates of taxation between Mellon and Union in 1934, Mellon was still properly included in the class of national banks for the purpose of taxation under the Act of 1897.

We respectfully submit that this case should not be decided by the effect of the Pennsylvania statutes upon these exceptionally large national banks and trust companies, because—

(1) The Constitution of the United States does not protect property as such or in itself. It protects only persons in the ownership of property. The tax in this case is imposed upon the shareholders, and not upon the national banks or trust companies. (supra p. 29)

(2) The Constitution does not protect the large shareholders at the expense of the small shareholders. No one, we believe, will have the temerity to argue the contrary. The Constitution makes not the slightest difference whether a person owns little or much.

The same principles, we submit, govern in determining whether the tax imposed by the Pennsylvania statute upon the share of national banks is in violation of Section 5219.

If quantity is to be considered, it is the quantity of persons—owners—shareholders and not the quantity of

assets or property. The rule to be laid down by this court must fit not merely the exceptional largest national banks and trust companies but must also protect all members of the respective class. It must be applicable with justice and fairness to the shareholders of the many other national banks which have invested less than 20 percent of their capital, surplus and undivided profits in federal securities.

It is highly probable that the smaller companies and national banks have many more shareholders than the seven largest national banks and trust companies.

From many expressions in the opinions of the Supreme Court of the United States, it is clear that the purpose of Congress was to protect national banks from discriminatory taxes which would hinder their growth, supra, p. 14, and there was no intent to strike down a state system of taxation for such a slight difference as 1 or 1½ mills which would not hinder the growth of national banks. Proof of the fact that this difference has not hindered the growth of national banks in Pennsylvania, is found in the phenominal growth of national banks.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

United States Revised Statutes Section 5219, 12 U.S.C.A., Sec. 548

The authority of states to tax shares of national banks is conferred by Section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. Sec. 548, which is as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

"(b) **In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks:** Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

(Emphasis supplied)

Act of 1897 Applicable to National Banks and State Banks

The Act of July 15, 1897, P. L. 292, 72 PS Section 1931, as last amended by the Act of May 31, 1933, P. L. 1130, provided:

"Section 1. Be it enacted, &c., That from and after the passage of this act, every bank or savings institution having capital stock, incorporated by or under any law of this Commonwealth, or **under any law of the United States**, and located within this Commonwealth, shall, on or before the fifteenth day of March in each and every year, make to the Department of Revenue a report in writing, verified as required by law, setting forth the full number of shares of the

capital stock subscribed for or issued, as of the preceding thirty-first day of December, by such bank or savings institution, and the actual value thereof as of the preceding thirty-first day of December, which actual value shall be ascertained as hereinafter provided. It shall be the duty of the Department of Revenue to **assess such shares for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of the State**, that is to say, **at the rate of four mills upon each dollar of the actual value thereof; the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus, and undivided profits, and dividing this amount by the number of shares.** It shall be the duty of every bank or savings institution, within a period of sixty days after the date of such settlement by the Department of Revenue to collect the amount of said tax from its shareholders and pay the same to the State Treasurer through the Department of Revenue: * * *"

(Emphasis supplied)

Act of 1907 Applicable to Trust Companies

The Act of July 13, 1907, P. L. 640, 72 PS Section 1991, as last amended by the Act of May 31, 1933, P. L. 1132, provided:

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorpo-

rated under the provisions of section twenty-nine of an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth, one thousand eight hundred and seventy-four, and its supplements, or any other act of Assembly hereafter approved, for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances, and every company entitled to benefits of, and every company having any of the powers of, companies entitled to the benefits of an act, entitled, 'An act conferring upon certain fidelity, insurance, safety deposit, trust, and savings companies the powers and privileges of companies incorporated under the provisions of section twenty-nine of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, Anno Domini one thousand eight hundred and seventy-four, and of the supplements thereto,' approved June twenty-seventh, one thousand eight hundred and ninety-five, **commonly known as title insurance or trust companies**, and every company organized as a **bank** and **trust** company or as **a trust company** under any act of Assembly hereafter approved, shall, on or before the fifteenth day of March in each and every year, make to the Department of Revenue a report in writing, setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof as of December thirty-first pre-

ceding, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the Department of Revenue to assess such shares for taxation **at the rate of five mills upon each dollar of the actual value thereof; the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits.**

"As is not invested in shares of stock of corporations liable to pay to the Commonwealth a tax on shares; or

"As is not invested in such portion of the capital stock of **corporations liable to pay to the Commonwealth a capital stock** tax as the capital stock of such corporation employed within this Commonwealth and liable to a capital stock tax bears to the total capital stock of such corporation; or

"As is not invested in such portion of the capital stock of corporations **specifically relieved** under the laws of this Commonwealth **from the payment of a capital stock** tax as the capital stock of such corporation employed within this Commonwealth and relieved from the payment of a capital stock tax bears to the total capital stock of such corporation,—

"And dividing this amount by the number of shares."

(Emphasis supplied)

OCT 15 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

NO. 328

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

MELLON NATIONAL BANK AND TRUST COMPANY,
successor to MELLON NATIONAL BANK,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Common Pleas of Dauphin County, Pennsylvania (R. 154a) is reported at 63 Dauph. Co. Rep. 289. The opinion of the Supreme Court of Pennsylvania (R. 202a) is reported in 374 Pa. 519.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Did the Commonwealth of Pennsylvania, for the year 1934, tax the shares of national banks at a greater rate than was assessed upon other monied capital in Pennsylvania coming into competition with the business of national banks in violation of Section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. 548?

2. After determining that unlawful discrimination in taxing the shares of national banks did exist, and that, to equalize the tax thereon with that on the shares of trust companies, the value of federal securities should be deducted, did the Court properly calculate the tax on the respondent national bank's shares at 4 mills, the rate applicable to national banks, instead of 5 mills, the rate applicable to trust companies?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix to the Petition at pp. 36-40.

STATEMENT OF THE CASE

In 1934 the shares of national banks were taxed at the rate of 4 mills on the value of their capital, surplus and undivided profits by the Act of 1897, P.L. 292, as amended; 72 P.S. 1931.

In 1934 the shares of trust companies (including banks and trust companies) were taxed at the rate of 5 mills on the value of their capital, surplus and undivided profits by the Act of 1907, P.L. 640, as amended; 72 P.S. 1991. But in ascertaining value for tax purposes they were permitted, for the tax year here involved, to deduct the value of their stocks of corporations paying or expressly exempted from paying a capital stock tax and the value of their federal securities (R. 46a).

The Act of 1907 as amended did not *expressly* allow trust companies to deduct the value of their federal securities. The deductions were allowed following a decision of this Court* holding that the allowance of deductions of the value of stocks of Pennsylvania corporations without allowing deductions for federal securities was a discrimination against federal securities and that deductions for both must be allowed. Perhaps so long as the deductions allowed trust companies and denied national banks were limited to the value of their

---

* *Schuylkill Trust Co. v. Pennsylvania,* 296 U.S. 113 (1935). This case was decided November 11, 1935 and dealt with the tax year 1930. Since the law permits taxpayers to apply for a resettlement within a period of five years after payment of the tax, the state institutions affected by the decision were able to take advantage of it for the tax year 1934. ("The Fiscal Code", Act of 1929, P. L. 343, Secs. 503 and 1104).

stocks of Pennsylvania corporations, the inequality of treatment was adequately counteracted by the higher tax rate on the shares of the trust companies, and that, since neither identity of the taxing formulae nor mathematical equality of the amounts is required, Section 5219 (12 U.S.C.A. 548) was not violated. But between 1930 and 1934 all banking institutions, national and state, invested large amounts in federal securities and when trust companies were allowed to deduct the value of these securities and national banks were not, an indisputably wide disparity between the *effective* tax rates was created.

It is admitted that since 1923 trust companies have been engaged in the banking business and the Commonwealth concedes that the capital of trust companies and the capital represented by their shares is "other monied capital in substantial competition with" the capital of national banks and the capital represented by their shares (R. 47a, 63a).

In 1934 respondent was taxed $145,783. Its effective rate was 3.99 mills (R. 59a).

Since national banks were permitted deductions only for the value of their shares in other national banks, the effective tax rate of all national banks closely approximated 4 mills. The rate for the 10 largest national banks was exactly the same as respondent's, 3.99 mills (R. 86a-87a). For the 47 national banks with capital of $1,000,000 or more, the rate was 3.92 mills (R. 85a). The rate for all national banks was 3.85 mills (R. 56a-59a).

By comparison, the effective rate for all competing trust companies was 1.9 mills (R. 52a-54a). 50 state institutions with capital of $1,000,000 or more paid an effective rate of 1.66 mills (R. 84a-85a). The rate for the 10 largest trust companies was 1.24 mills (R. 86a).

Respondent's principal competing state institution paid an effective rate of .7 mill (Ex. L). With three times the capital of respondent, this competitor paid less than half the amount of tax.

On the basis of the stipulated facts, the Dauphin County Court found that in the year 1934 the shares of national banks were taxed at a greater rate than the tax on a relatively material part of the other monied capital employed in substantial competition with national banks. It found that the disparity was caused by the deductions allowed state institutions which were denied the national banks. The Court deducted from respondent's base the value of its federal securities and applied the tax rate provided in the Act of 1897. This reduced respondent's tax from $145,783.65 to $15,796.40.

The Supreme Court of Pennsylvania affirmed the judgment of the Dauphin County Court of Common Pleas.

ARGUMENT

The Supreme Court of Pennsylvania has denied Pennsylvania the right to tax national bank shares for the year 1934 without allowing the deductions permitted state institutions. Pennsylvania seeks review by this Court solely on the ground that it claims a right under Section 5219, which its own courts have denied.

But the right to tax respondent's shares has not been denied. The decision is limited to a ruling that, in determining the amount of the tax, the same deductions must be allowed national banks that are allowed state institutions.

The second issue does not involve a federal question. It does not involve a construction of Section 5219. After concluding that the disparity resulted from the failure to allow national banks deductions which are allowed state institutions, the Pennsylvania courts simply applied the 4 mills rate provided in the Act of 1897 instead of the 5 mills rate provided by the Act of 1907. There is certainly nothing in Section 5219 which forbids a state to tax national banks at a *lower* rate than the tax on other competing capital. This issue is solely a state matter and involves merely the choice of the appropriate state statute.

I.

The Decision Below Is Clearly Correct.

The Commonwealth's contention that respondent voluntarily created the disparity by making large investments in federal securities is basically erroneous. Respondent's investments have no effect whatever on its effective tax rate. On the contrary, the disparity was created by the large investments in federal securities made by competing state institutions, for which they were allowed a deduction. When the legislature, in 1936 (1936 First Ex. Sess., P.L. 73, Sec. 1), took measures to correct the discrimination it made no change whatever in the assessment of shares of national banks. It amended the Act of 1907 by taking away from trust companies the right to the deductions which had caused the disparity of treatment.

The argument that Section 5219 was intended to prevent only "hostile and unfriendly" discrimination against national banks was squarely met and rejected by this Court in *First National Bank of Hartford v. City of Hartford,* 273 U.S. 548, 560-561 (1927). In *Schuylkill Trust Co. v. Pennsylvania,* 302 U.S. 506, there was no evidence of any "hostile and unfriendly" discrimination against federal securities.

In reality, the present case involves another application of the underlying doctrine of the *Schuylkill Trust Co.* case. If it is discriminatory to allow a trust company to deduct the value of Pennsylvania securities without allowing a similar deduction for the value of federal securities, it is equally discriminatory to allow state institutions to deduct the value of federal securi-

ties without allowing national banks to make similar deductions.

The Commonwealth's contention that the discrimination is limited to a few exceptional cases of very large national banks and trust companies ignores the admitted facts. It is true that the 10 largest trust companies paid the lowest rate (1.24 mills) and were therefore most favored. But these 10 largest state institutions represented, in the aggregate, $237,606,184 of competing capital (R. 86a). And all trust companies paid an aggregate effective rate of 1.9 mills, which was less than half the national bank rate (R. 52a-54a). A taxing policy under which national banks as a class pay twice the effective rate paid by competing state institutions as a class, is clearly discriminatory. *Whitbeck v. Mercantile National Bank,* 127 U.S. 193; *Pelton v. Commercial National Bank,* 101 U.S. 143; *First National Bank v. Lindsay,* 45 Federal 619 (Reversed on other grounds, 156 U.S. 485); *First National Bank v. Treasurer of Lucas County,* 25 Federal 749 (Appeal Dismissed, 131 U.S. 450).

The fact is that respondent proved much more than was necessary. This Court, in construing Section 5219, has said that "every clear discrimination against national bank shares and in favor of a *relatively material part* of other monied capital employed in *substantial* competition with national banks is a violation of both the letter and the spirit of the restriction." (Emphasis added). *First National Bank of Guthrie Center v. Anderson,* 269 U.S. 341. It would have been sufficient to show that the rate paid by national banks as a class (3.85 mills) was over three times as great as the rate

(1.24 mills) paid by the 10 largest competing trust companies having an aggregate capital of $237,606,184.

Finally, the Commonwealth's suggestions that a disparity in the tax rate of as little as 2 mills is not "substantial" and that it was respondent's burden to show that the discrimination had "the effect of promoting the growth of state banks at the expense of national banks" (Brief, p. 28) are wholly without merit.

"Substantial" is a relative term. Whether 2 mills is substantial depends upon the size of that with which it is compared. 2 mills is one-half of 4 mills and a 4 mills tax is twice as great as a 2 mills tax. In many comparisons 2 inches may be insignificantly small, yet if added to the end of a man's nose it becomes colossal.

There is nothing in Section 5219, or in any of the cases construing it, even remotely suggesting that discrimination is forbidden only where it has the effect of promoting the growth of state banks at the expense of national banks. Section 5219 forbids discrimination *per se*. It compels a substantial equalization of the tax burden. Its operation is not dependent upon whether national banks may, in fact, be strong enough to carry a heavier burden than the burden carried by other competing capital.

II.

There Is No Important Question of Federal Law.

There is no suggestion in petitioner's brief that the present case involves a question of federal law of importance to any one except the Commonwealth of Pennsylvania, whose courts have decided the issues against the Commonwealth. No fundamental question of interpretation of Section 5219 is involved. The issue is primarily factual. What the Commonwealth really seeks is simply another hearing, for which this Court does not grant certiorari. *Magnum Co. v. Coty,* 262 U. S. 159, 163.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

OCT 30 1953
HAROLD B. WILLEY, C

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v.

MELLON NATIONAL BANK AND TRUST COMPANY, Successor to Mellon National Bank

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The question in this case is not (as stated by respondent on page 6 of its brief) whether Pennsylvania may tax shares of national banks without allowing the deductions permitted to "state institutions".[1]

The combined effect of the higher rate of 5 mills, with a deduction of federal securities, for shares of Pennsylvania trust company, must be compared with the lower

[1] Respondent's use of the term "state institutions" should not be allowed to obscure the fact that only trust companies are involved in this comparison. Shares of 176 State banks are taxed by Pennsylvania under the same act as shares of national banks: Act of June 15, 1897, P. L. 292, quoted on page 37 of Petition.

rate of 4 mills, without such deduction, for shares of national banks, in order to determine whether the actual or effective rate for national banks is higher than that for trust companies.

Without the deduction of federal securities, the shares of trust companies would pay a tax of 5 mills as compared with the rate of 4 mills for national banks, or twenty-five per cent more.

Whether the combined effect produces a higher rate for shares of national banks necessitates a consideration and construction of R. S. 5219, and is a federal question: *Mercantile Bank v. New York,* 121 U. S. 138, 160 (1887); *Tradesmens Bank v. Tax Commission,* 309 U. S. 560, 567-568 (1940).

The fact that the right claimed by the Commonwealth has been denied by the Supreme Court of Pennsylvania, one of its own courts, is immaterial to the question of jurisdiction.

In Robertson and Kirkham on Jurisdiction of the Supreme Court of the United States, the rule is stated:

> "* * * The state * * * may invoke the appellate jurisdiction of the Supreme Court as against decisions of its own courts limiting the exercise of its taxing power upon federal constitutional grounds." (302-303)

In support, the authors cite *State Tax Commission v. Aldrich,* 316 U. S. 174 (1942) in which this Court reversed a decision of the Supreme Court of Utah, which had held that the State could not impose an inheritance tax upon the transfer of the stock of a Utah corporation owned by a decedent domiciled in New York.

On appeal by a state this Court has reversed constructions of federal statutes made by the highest Court of the State in *California v. Deseret Water, & Co.*, 243 U. S. 415, 417 (1917); *Coleman v. Miller*, 307 U. S. 433, 438, 466 (1939).

Respondent asserts (p. 6) that the "second issue does not involve a federal question". The second issue is discussed on pages 30-32 of petitioner's brief. Calculating the tax of a national bank at 4 mills with the added deduction of federal securities, places national banks on a better basis—at a lower effective date—than trust companies. The Court more than gave national banks an equal rate prescribed by R. S. 5219. It found a greater violation of R. S. 5219 than actually existed. In other words, it overcorrected the alleged discrimination or violation.

The extent, if any, to which the State statute violates R. S. 5219 involves the interpretation of that federal statute, and this question of the interpretation of an act of Congress is a federal question. The Pennsylvania courts taxed the shares of Mellon National Bank at the rate of 4 mills, imposed by the Act of 1897, but also allowed Mellon National Bank the exemption of federal securities which is granted by the Act of 1907 to shares of trust companies upon which the Act of 1907 imposed a rate of 5 mills.

The Pennsylvania courts give the Mellon National Bank a larger measure of relief than a proper construction of R. S. 5219 requires. This issue cannot be determined without a construction of R. S. 5219 and therefore presents a federal question.

Respondent argues (p. 7) that if it is discriminatory to allow a trust company to deduct Pennsylvania securities without a similar deduction for federal securities in the Schuylkill Company case, it is equally discriminatory to allow trust companies to deduct federal securities and not to allow national banks to make a similar deduction.

In the case at bar a trust company's shares pay the rate of 5 mills as against a rate of 4 mills for national bank shares, and the combined effect of the higher rate for trust companies with the deduction must be compared with the lower rate, without the deduction, for national banks. In the Schuylkill case only one tax statute and one rate were involved. No calculation of a combined effect of several factors was necessary. In the case at bar two different statutes and two different rates have to be compared.

Respondent cites (p. 8) *First National Bank of Guthrie Center v. Anderson,* 269 U. S. 341, and argues that in the case at bar there is a discrimination against "a relatively material part of other moneyed capital" (348). In the Guthrie case, however, the bill in equity alleged that within the county there were held $5,000,000 of notes, bonds and other evidences of indebtedness. This "relatively material part of other moneyed capital" was all of this class of moneyed capital, not a part of the class composed of the ten largest investors.

So in our case a "relatively material part" would consist of the shares of all trust companies in comparison with the shares of all national banks. To treat the ten largest trust companies as a "relatively material part of other moneyed capital" would violate the prin-

ciple of classification. The effect of the different rates of tax upon shares of trust companies and national banks can only be determined by comparing all national banks with all trust companies and not the few largest national banks with the few largest trust companies.

In *Cummings v. National Bank,* 101 U. S. 153 (1879) this Court based its decision on a "manifest injustice to a large class of property" (163).

In *People v. Weaver,* 100 U. S. 539 (1879) the Court found discrimination "against this class of property" (543). See also *National Bank v. Kimball,* 103 U. S. 732, 735 (1880).

In *Supervisors v. Stanley,* 105 U. S. 305 (1881) Mr. Justice Miller said:

> "* * * we should be very reluctant to hold that, when it has been shown that a single bank or a single individual has been taxed less than he should be, all other taxes, however just, are thereby invalidated. * * *
>
> "If by this it is supposed that a few individual instances may be shown of partial assessments favoring citizens as compared with the national banks, we think it is erroneous. * * *" (317-318)

Respondent asserts (p. 9) that nothing in R. S. 5219 remotely suggests that discrimination is forbidden only where it promoted the growth of said banks at the expense of national banks. In reply we refer to *Aberdeen Bank v. Chehalis County,* 166 U. S. 440, 457 (1897); *First National Bank v. Hartford,* 273 U. S. 548, 558 (1927); *Amoskeag Savings Bank v. Purdy,* 231 U. S. 373,

389-390 (1913); *Mercantile Bank v. New York*, 121 U. S. 138, 155 (1887).

It has never been the policy of the federal government under R. S. 5219 to interfere with the policy of a State in developing banking corporation: *Jenkins v. Neff*, 186 U. S. 230, 237 (1902); *Mercantile Bank v. New York, supra*, p. 156; *Aberdeen Bank v. Chehalis County, supra*, p. 458.

Respondent argues (p. 10) that the question of federal law in the case at bar is important to no one except the Commonwealth of Pennsylvania.

In reply we refer the Court to the questions presented (pp. 3-4) and the reasons for allowance of appeal (pp. 11-16) in petitioner's brief.

The questions involved in this petition affect all states which tax shares of national banks and State banks and which involve a comparison not only of rates but of deductions. Such a comparison furnished the question involved in a large percentage of the cases decided by this Court under R. S. 5219.

It might be argued with equal plausibility that each of such cases involved a question of federal law of importance only to the State whose courts have decided the issues against the State.

Respondent's brief is based on the effect of the Pennsylvania tax upon the *ten* of the largest national banks out of a class of 715 national banks and as compared with the effect upon the ten largest trust companies out of a class of 236 trust companies. This is a novel kind of classification. How could a State adminis-

ter its tax laws if respondent's position were adopted. It would have to compare a computation of the tax on the shares of every national bank with a computation of the tax on the shares of every trust company.

If the principle of classification is satisfied by comparing the effect of the rate upon a small convenient number of national banks with the effect of a rate upon a small convenient number of trust companies, then the tax statutes and assessments of many states will be invalidated.

Therefore the issue in this case is not primarily factual as respondent asserts (p. 10), but is a question of legal interpretation with which numerous decisions of this Court have been concerned.

Respectfully submitted,

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